Making gifts of the Right of Survivorship: Jackson v. Rosenberg, 2023 ONSC 4403

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Recent cases underscore the puzzling nature of a "gift of the right of survivorship" and the perils of using joint tenancy as an estate planning tool. In our article "Joint tenancy and gifting the right of survivorship" published in 2022, we examined the concept of a "gift of the right of survivorship" and some lingering questions about its doctrinal soundness. We reviewed the caselaw in British Columbia, such as *Kennedy v. Smith*, 2022 BCSC 1622, that has developed in the post-*Pecore* era concerning jointly-owned property and the presumption of resulting trust. A recent Ontario case – *Jackson v. Rosenberg,* 2023 ONSC 4403 (28 July 2023, Charney J.) – covers similar ground and has attracted a fair bit of attention in that province given the Court's comment that it serves as a "cautionary tale" about using joint tenancy in estate planning.

The *Jackson* decision largely follows British Columbia cases on the nature of a gift of the right of survivorship but departs from the developing law in one significant aspect: the Ontario court suggests that there can be a "partial" rebuttal of the presumption of resulting trust thereby allowing the right of survivorship to survive a severance of the joint tenancy. This finding has no basis in the law relating to resulting trusts or joint tenancies. The substantial inconsistency between the *Jackson* case and British Columbia caselaw will be discussed below.

A short summary of British Columbia Law

Cases like *Kennedy v. Smith* and *Mong Alter Ego Trust No. 1 v. Yip,* 2022 BCSC 1327contain helpful summaries of the nature of a gift of the right of survivorship. As noted by Madam Justice Francis in *Kennedy v. Smith*, when there is a gratuitous transfer of property by party A into joint names with another person B, various possible scenarios arise: (1) a "true" joint tenancy in which the co-owners A and B each hold legal and beneficial title from the outset; (2) a resulting trust whereby B holds legal title only, and beneficial title belongs to A or A's estate; and (3) a gift of the right of survivorship whereby A has full beneficial ownership during his or her lifetime, but beneficial ownership only accretes to B upon A's death.

Madam Justice Francis confirmed that the third category, a "gift of the right of survivorship", is recognized under Canadian law. She also explained how certain *inter vivos* dealings by the transferor A can result in the right of survivorship being destroyed,

resulting in a gift of nil value for the transferee B. As held in cases like *Bergen v. Bergen*, 2013 BCCA 492 and *Zeligs Estate v. Janes*, 2016 BCCA 280, the gift of the right of survivorship for B depends upon the "ultimate gamble" of B first surviving A, but then B only receives what is left of the property, if anything, after the gamble is won. A joint bank account could have been drained, or a joint tenancy to real property severed, leading to no gift of any value. In the leading case of *Bergen v. Bergen*, Madam Justice Newbury summarized the point as follows:

> Where a joint tenancy in land is concerned, … either of the joint tenants is at liberty to sever the joint tenancy at any time … Severance, which occurs automatically upon the destruction of the four unities, ends the *jus accrescendi*, with the result that each co-owner becomes entitled to a distinct share in the land rather than an undivided interest in the whole. … As observed by Steel J.A. in *Simcoff v. Simcoff* 2009 MBCA 80, a case involving land, "the fact that a 'complete gift' … included a right of survivorship does not, *prima facie*, prevent a donor from dealing with the retained interest while alive. The right of survivorship is only to what is left". In the case of real property (and personalty, for that matter) nothing remains of the right of survivorship.

In the *Bergen* case, Mr. and Mrs. Bergen had added their son as a co-owner of a property near Trail, B.C., but only intended a gift of the right of survivorship. By severing the joint tenancy, the right of survivorship was extinguished. The son now held only a legal interest in the property and, since he had not acquired any beneficial interest at the time of the transfer, he held this interest in trust for his parents. Subject to a restitution claim by the son for expenditures on the property, he was left with an interest in the property that had nil value.

In the *Kennedy v. Smith* case, Mr. Smith had added his friend, Ms. Kennedy, as a co-owner of property in Langley. He intended to sell the property and keep all of the net proceeds, and the property was sold prior to trial. The Court held that Mr. Smith had intended only a gift of the right of survivorship to Ms. Kennedy (who was also a beneficiary of his will) and could take steps to sever the joint tenancy during his lifetime. Using the language of the Court of Appeal in *Bergen*, Francis J. concluded that "nothing remains" of the gift of the right of survivorship to Ms. Kennedy, as the sale of the property was the equivalent of Mr. Smith draining a joint bank account. The "gift" no longer had any value. The Court held that Mr. Smith was entitled to all of the net proceeds.

Jackson v. Rosenberg

The facts in *Jackson v. Rosenberg,* 2023 ONSC 4403 are fairly straightforward.

The applicant Nigel Jackson purchased property in Port Hope, Ontario following the death of his long-time spouse Bernie. Nigel and Bernie had previously made mirror wills in which they left their estates to each other, and with Bernie's "beloved grand-niece" Lori Rosenberg as the contingent beneficiary in each will. Nigel had no family of his own and maintained the intention to leave his estate to Lori. In February 2012, he transferred title to the Port Hope property from his sole name into a joint tenancy with Lori for nominal consideration ($2). The purpose of this transaction was to avoid the need for a grant of probate at the time of Nigel's death, and the saving of probate fees for the estate, given that title would pass automatically to Lori as surviving joint tenant.

The evidence confirmed that Nigel only intended to make a gift of the right of survivorship to Lori and that he would remain the sole owner during his lifetime. The relationship between Nigel and Lori, however, soured in 2020 following a visit by Lori's spouse to the Port Hope property. Lori's spouse discussed plans to upgrade the Port Hope property and sell it, and that it would be replaced by a property on a golf course where Nigel could live. Nigel was "shocked and frightened" by this conversation and became worried that he would be forced out of his home. In September 2020, Nigel took steps to sever the joint tenancy, and then applied to the Ontario Superior Court of Justice for an order that he was the sole beneficial owner of the Port Hope property.

Justice Charney reviewed the basic principles regarding joint tenancies and the "presumption of resulting trust". The 2012 transfer was a "gratuitous transfer", and the onus was on Lori to establish a gift. The Court held that it was Nigel's intention to remain the beneficial owner of the Port Hope property during his lifetime and "make a gift of whatever equity was left in the home after he died" (para. 46) – in other words, a gift of the right of survivorship. Nigel did not intend to gift the property to Lori during his lifetime (para. 52). Any later regrets by Nigel did not affect the nature of the gift, since it was his intention at the time of the 2012 transfer that is relevant.

Justice Charney provides a summary of the nature of a gift of the right of survivorship, with reference to the British Columbia cases of *Bergen*, *Zeligs Estate* and *Kennedy v. Smith* discussed above. He noted the statement of the British Columbia Court of Appeal in *McKendry v. McKendry*, 2017 BCCA 48 that a severance of the joint tenancy could "rob the gift of any value" (para. 66). Justice Charney also confirmed that Ontario law, like British Columbia and Manitoba law, allows a co-owner to take unilateral steps to sever a joint tenancy and convert it into a tenancy-in-common.

Although Justice Charney held that the presumption of resulting trust applied to the 2012 transfer, and that Nigel only intended a gift of the right of survivorship to Lori, he did not conclude that the severance of the joint tenancy in 2020 resulted in the right of survivorship being extinguished. In a novel approach, Charney J. concluded that the presumption of resulting trust in this case was only "partially rebutted". He held that Nigel's intention in severing the joint tenancy in 2020 was to "reduce" Lori's right of survivorship in the property and eliminate the survivorship right only with respect to his 50 per cent share of the property. Nigel could not revoke the right of survivorship with respect to Lori's 50 per cent share. Lori continued to hold her share of the property upon a resulting trust for Nigel during Nigel's lifetime, and Nigel retained "all right of ownership". When Nigel dies, his 50 per cent share of the property would form part of his estate, and Lori's 50 per cent share of "whatever equity remains" in the Port Hope property will pass to her by right of survivorship in accordance with the original 2012 gift.

Conclusion

The ultimate result in *Jackson v. Rosenberg* marks a significant departure from the caselaw developed in British Columbia. Cases like *Bergen* make clear that, upon a severance of the joint tenancy, the right of survivorship comes to an end. The transferee has lost the "ultimate gamble" of remaining a co-owner (in joint tenancy) until the death of the other co-owner, and there is no longer a right of survivorship. The beneficial interest of the transferee following severance would depend on the original intentions of the transferee: in cases like *Bergen* and *Kennedy v. Smith*, the transferee ended up with only a legal interest in the property which was held in trust for the transferor (a gift of nil

value); in contrast, the transferee could hold a beneficial interest of a portion of the property if that had been intended at the time of the original transfer (*Zeligs Estate*).

The notion of a "partial" rebuttal of the presumption of resulting trust, as suggested by the Ontario court in *Jackson v, Rosenberg*, is a curious one. It is fundamentally inconsistent with the law regarding joint tenancy, such as the requirement of "four unities" and that the co-owners have an undivided interest in the whole of the property. Further, the caselaw regarding the presumption of resulting trust that has developed since *Pecore* does not support a finding that the presumption can be "partially" rebutted. At the time of the severance in 2020, Lori did not have a 50 per cent share of the property, as if the Port Hope property had been co-owned as a tenancy in common. It should have been found that the steps taken by Nigel resulted in a severance of the joint tenancy, and therefore a destruction of the right of survivorship. Lori would have been left with a legal interest in 50 per cent of the property, as a tenant in common, which she held upon a resulting trust for Nigel or Nigel's estate. She would have held no beneficial interest, and the right of survivorship had come to an end. Accordingly, upon Nigel's death, his estate would be the sole beneficial owner of the Port Hope property.

An appeal has been filed with the Ontario Court of Appeal in the *Jackson v. Rosenberg* proceeding. Lori alleges that Charney J. erred in finding that there was a valid severance of the joint tenancy, and that she now holds 50 per cent of the Port Hope property in trust for Nigel during his lifetime. The Court of Appeal will have the opportunity to review the nature and scope of a gift of the right of survivorship, as well as Justice Charney's novel conclusions about a "partial" rebuttal of the presumption of resulting trust. If the Court of Appeal concludes that there was a valid severance of the joint tenancy, and applies the law developed by the courts in British Columbia, it should be found that Nigel's severance of the joint tenancy brought the right of survivorship to an end, and "nothing remains" of the gift to Lori.

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